THE USE OF LEGAL MATERIAL IN TEACHING ETHICS[1]

THE present keen interest in the problems of justice and its administration through the courts affords an unusual opportunity for the teacher of ethics. The questions of constitutionality, of the "rule of reason," of "rights" of various kinds, are no longer regarded by the public as technical matters to be discussed by experts only. Following theology and education, law is taking its turn at being heckled, and as a result is likely to return to closer relation with public sentiment from which it once arose. Undergraduates are sufficiently affected by the general attitude of the public to respond to illustrations drawn from current legal doctrines and discussions. Some problems which may seem to be highly abstract are seen to have important bearings. The following suggestions are intended merely to indicate a few typical instances.

1. One of the most discussed questions at present is that of the fixed, as *versus* the flexible constitution. The underlying assumption in the idea of a constitution is that there are certain principles so general that they may be placed in a separate category from other less general rules. Such principles are analogous to the universal laws of rationalistic ethics. Few publicists would affirm that a constitution should never be altered in any respect, yet many would consider it as consisting largely of "eternal truths," of fundamental rights. If it is to be changed some would prefer to change it only by a formal amendment which then becomes again a "universal law." It is easy in the books to discuss Kant's "universality" as merely formal and therefore empty. But why the deep-seated objection to "special legislation"; why the general approval of constitutions, unless there is some reason for framing our laws so that they shall apply to all?

On the other hand the position of the empiricist or pragmatic critic of eternal laws is equally well rooted in judgments of common sense and in present criticisms upon fixed constitutions. Those who advocate the "recall" of decisions upon constitutional questions would change principles, but not by substituting a universal law of absolute extent. They point to the Fourteenth Amendment to the Federal Constitution as an instance that such a sweeping declaration may have applications undreamed of by its proponents. They propose rather a specific modification. Others, who deem such a specific modification too radical a method when it takes place by popular vote, approve the method of tentative and gradual change if carried through by the process of judicial interpretation. The

[1] Read before the Western Philosophical Association, University of Chicago, April 6, 1912.

Federal Supreme Court may be said to illustrate the method of "working hypothesis" in its amendment or development of the constitution. A decision is handed down and allowed to stand until it appears that the unlimited application of its principle is undesirable. Then a basis is found for restricting this by some other principle. This method of reconstructing principles, in view of their working, raises another interesting problem. It proceeds under the "legal fiction" that judges do not make law, but only declare or interpret law. It thus preserves the seeming immutability of law while actually admitting change. What are the advantages and disadvantages of this method in the field of ethics? Is it better to make clear our moral reconstructions and thus make "progress" our chief value, or to keep continuity in the fore and thus preserve the sanctions of unity with past values?

Under this point, it may be worth noting also that at present the objectors to the fixed rules who are most active are not the antisocial, but the social reformers.

2. Another question connected with general rules is illustrated by a recent case under the criminal clause of the Sherman Act. The prosecution supposed it had a very strong case, but the jury acquitted the defendants. It is held by some in explanation of the outcome, that though the prosecution made a strong showing that there was a combination, it did not show conclusively that this had specifically injured any one. It is claimed that a jury is not likely to convict unless injury is shown. If this is the case, it is a significant evidence that the average man, even when an "impartial spectator," is not ready to support the sanctity of "law" unless he can see a reason for the law in some concrete consequences of its violation. Indeed this is but a part of a more general situation. When a man fails to live up to his professed standards, we usually assign his failure to his incomplete control over his passions, or to the lack of effective motivation for good. But it is possible that there may be another reason in some cases. It is notorious that lawmakers are more ready to pass strict laws and affix rigorous penalties than juries are to enforce them. This may be due to the fact that lawmakers are better men; it may also be due to the fact that they abstract unduly from the complex motives and interests of human nature. It may be true that the average man does not err in being too strict with himself, but in the problems of moral education there is certainly a suggestion here for the lawmaking parent and teacher.

3. Another line of cases offers an illustration of the issues involved in the subject of the moral judgment. Do we judge motives, intentions, or results? The ordinary legal doctrine that a criminal act must include both intent and overt act is well known, but some

further points are of interest. It is commonly said that the law does not consider motives. No doubt it does not permit a religious fanatic to justify illegal acts on the ground that his motives were good. Nevertheless, if we take motive as indicating the more remote, and intent the more immediate aim, it is evident that sometimes one will be singled out as important and sometimes the other. In strike cases, the courts have sometimes held that the injury to the employer was the primary intent, and have refused to consider the more remote aim of benefiting the strikers; whereas in business competition, it is assumed that self-benefit is the important part of the process, the injury to competitors being incidental. In a recent case, however, a court upheld a strike called to compel the discharge of a helper to one of the men. The decision admitted the injury to the individual whose discharge was sought, but maintained that this was incidental.

Strikes to obtain a closed shop have been enjoined where no specific gain other than that of securing monopoly has been in evidence. Such cases bring out very well the problem of end and means.

4. Is there a "common good," or are there only "individual" goods? The courts have long had an answer to this question which at any rate may be regarded as the answer of common sense, and as indicating the ordinary usage. Taxes may be levied for public purposes only. It is recognized that the public good will indirectly benefit the private citizen, and, conversely, that which benefits the private citizen is likely, in the end, to benefit the public. But it is held that the distinction is clear between what is primary and what is indirect or secondary. Another aspect in which the same distinction arises is in the supremacy of the police power over the rights of private property. To provide for mutual confidence in the conduct of business is, according to a recent decision, within this power. That is, public good and general welfare do not mean merely the public in corporate capacity: they include the maintenance of social relations. The principle seems eminently sound to one who holds to the doctrine of a common good, but whether it is accepted or not, such cases afford excellent opportunity to show clearly what is involved.

The obvious difficulty in the way of using legal material is that the teacher of ethics has ordinarily had no legal training and is therefore liable to mislead if he cites a principle or a case which may need qualification by other principles or cases. This difficulty no doubt is serious, but such works as Goodnow's "Social Reform and the Constitution," and Freund's "The Police Power," used in connection with the source books for constitutional law, enable even the layman to find material and see it in its broad relations.

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